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In The

Supreme Court of the United States

October Term, 1979

No. **79-1756**

KEENAN MOTORS, INC.,

Petitioner,

vs.

A.R.D. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Basis For Federal Jurisdiction of the District Court 5

Reasons For Granting the Writ:

I. The trial judge's instruction to the jury as to the burden of proof required to establish intent to defraud under a federal statute, affirmed by the court of appeals, was contrary to the standard of proof required in the federal courts to establish civil fraud.. 6

II. The decision below affirming the award of $50,000 in punitive damages where only $5,200 in compensatory damages was awarded, seriously conflicts with the long established applicable Pennsylvania law. 10

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Addington v. Texas, 99 S. Ct. 1804 (1979) 7

Collins Securities Corporation v. S.E.C., 562 F.2d 820 (C.A.D.C. 1977) 8

Contents

Page

Eastern Express, Inc. v. Mack Warehouse Corporation, 326 F.2d 554 (3rd Cir. 1964) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 12

Golomb v. Korus, 396 A.2d 430 (1978) 12

Hannigan v. S. Klein's Department Store, 1 D. & C. 3rd 339 (Phil. Ct. Comm. Pleas, 1976) 10

Hughes v. Babcock, 349 Pa. 475, 37 A.2d 551 (1954) 11

Proctor v. Sagamore Big Game Club, 265 F.2d 196 (3rd Cir. 1959) 9

Ratay v. The Lincoln National Life Insurance Company, 378 F.2d 209 (3rd Cir. 1967) 9

Voltz v. General Motors, 332 Pa. 141 (1938) 11

Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S. Ct. 483 (1976) 6

Statutes Cited:

15 U.S.C. §1988 2

15 U.S.C. §1989 ..... 2, 3, 4, 5

15 U.S.C. §1989(b) 5

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 5

Contents

Page

APPENDIX

Petition For Rehearing 1a

Judgment Order of the United States Court of Appeals For the Third Circuit Dated March 17, 1980 ..... 3a

Memorandum and Order (Filed April 5, 1979) 5a

Memorandum and Order (Filed July 3, 1979) 11a

In The

Supreme Court of the United States

October Term, 1979

No.

KEENAN MOTORS, INC.,

Petitioner,

vs.

A.R.D. CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Keenan Motors, Inc. respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1980 and on which a rehearing in banc was denied by order of the said court (two of the said judges having voted to grant a rehearing) on April 9, 1980.

OPINION BELOW

There was no formal opinion of the court of appeals. Its judgment order affirming the judgment of the United States District Court is reproduced in the appendix and has not yet been reported. The opinions of the district court, which have not been reported, are reproduced in the appendix.

JURISDICTION

The judgment order of the court of appeals was entered on March 17, 1980. A petition for rehearing, timely filed, was denied on April 9, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, in a claim under 15 U.S.C. §1989, for knowingly and with intent to defraud, selling an automobile which had more miles on it than shown on its odometer, the court of appeals erred in affirming the trial judge's instruction to the jury that the intent to defraud under 15 U.S.C. §1989 need be established only by a preponderance of the evidence as opposed to a higher standard of civil proof.

2. Whether the court of appeals, in a claim for compensatory and punitive damages under Pennsylvania law, erred in disregarding Pennsylvania law in affirming an award of $50,000 in punitive damages where the jury found compensatory damages of only $5,200 and Pennsylvania law requires that punitive damages be proportionate to and reasonably related to the compensatory damages.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §1988 provides in pertinent part:

> "(a) Not later than 90 days after October 20, 1972, the Secretary [of Transportation] shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of the motor vehicle:
>
> (1) Disclosure of the cumulative mileage registered on the odometer.

> (2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually travelled.
>
> . . . (b) No transferor shall violate any rule prescribed under this section or give a full statement to a transferee in making any disclosure required by such rules."

15 U.S.C. §1989 provides in pertinent part:

> "(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of — (1) three times the amount of actual damages sustained or $1,500, whichever is greater. . . ."

STATEMENT OF THE CASE

This suit, instituted in the United States District Court for the Eastern District of Pennsylvania, arises out of the sale of a used 1969 Rolls Royce automobile (herein automobile) by petitioner Keenan Motors, Inc., an authorized Rolls Royce dealer to A.R.D. Corporation (herein plaintiff) for $19,000 in March of 1977 and basically involves two separate causes of action. One cause of action is a claim under Section 1989 of the Motor Vehicle and Cost Savings Act, 15 U.S.C. §1989 which in essence imposes liability on a transferor of an automobile, who, with intent to defraud, knowingly transfers an automobile which had travelled more miles than indicated on its odometer without revealing the same to the transferee. The other cause of action is a claim under Pennsylvania law for compensatory damages and punitive damages for negligence in connection with the repair of the automobile.

Plaintiff in its complaint alleged the automobile had travelled more miles than indicated on its odometer and petitioner knowingly and with intent to defraud sold the automobile to it without revealing the alleged discrepancy in mileage in violation of 15 U.S.C. §1989. Plaintiff further alleged that petitioner failed to make certain repairs and was negligent in making other repairs to the automobile.

Petitioner denied all of the charges made in the complaint.

The case was tried before District Court Judge Clarence C. Newcomer and a jury.

At the trial petitioner denied that the automobile had travelled more miles than indicated on its odometer, and relied on the testimony of the prior owner's husband — a retired, wealthy executive, the wife owner having died prior to trial, who testified that neither he nor his wife ever tampered with the odometer and that the mileage was consistent with his wife's driving habits, his wife having purchased the automobile new from petitioner some years earlier. Plaintiff produced no actual evidence that the automobile had in fact travelled more miles than indicated on its odometer, but relied solely on opinion evidence of four persons none of whom examined the automobile until more than three months after the date plaintiff purchased the automobile from petitioner and after plaintiff had driven the automobile some 8,000 miles.

With respect to the negligence count, plaintiff contended that one of petitioner's employees disconnected a wire leading to the brake warning lights, but this was denied by the employee in question. There was disputed testimony as to the other repairs.

The jury found against petitioner on all counts and awarded plaintiff $4,500 on the count under 15 U.S.C. §1989 which was trebled by the court to $13,500, and awarded plaintiff $5,200 in compensatory damages representing repairs and substitute

transportation caused by petitioner's negligence and awarded plaintiff $125,000 in punitive damages on the negligence count.

The trial judge denied petitioner's post trial motions for judgment notwithstanding the verdict and for a new trial, but reduced the award of punitive damages $50,000. The trial judge awarded plaintiff counsel fees of $9,920 under 15 U.S.C. §1989 and entered a judgment in the total sum of $79,620 against petitioner.

The court of appeals by judgment order entered March 17, 1980 affirmed the judgment entered by the trial judge without opinion.

Petitioner filed a petition for rehearing before the court of appeals in banc, which petition was denied by the court of appeals with two judges of the court of appeals voting in favor of rehearing.

BASIS FOR FEDERAL JURISDICATION OF THE DISTRICT COURT

Jurisdiction of the district court with respect to the claim under 15 U.S.C. §1989 was based on 15 U.S.C. §1989(b) and jurisdiction with respect to the claim for negligence under Pennsylvania law was based on diversity of citizenship in accordance with 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

I.

The trial judge's instruction to the jury as to the burden of proof required to establish intent to defraud under a federal statute, affirmed by the court of appeals, was contrary to the standard of proof required in the federal courts to establish civil fraud.

In this case the issue as to whether the automobile had in fact travelled more miles than indicated on its odometer was vigorously contested by petitioner. In fact, petitioner's evidence apparently persuaded the trial judge that the vehicle in fact did not travel more miles than indicated on its odometer because the trial judge in his memorandum opinion accompanying his order awarding plaintiff counsel fees wrote:

> "Considering the testimony of the prior owners of the car presented by the defendant, the Court frankly might not have arrived at the same conclusion that the jury did, i.e., that the car had traveled more miles than were reflected on its odometer at the time it was sold to the plaintiff." (R780a).

In submitting this issue to the jury, the trial judge charged that "A.R.D. alleges that Kennan Motors knew the odometer was incorrect and sold the car to A.R.D. with an intent to defraud. This claim must be proved by a preponderance of the evidence . . ." (R725a).

The objection made by petitioner's counsel that intent to defraud had to be established by a higher civil standard (R739a, 740a) was denied by the trial judge.

In *Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 285, 87 S. Ct. 483, 488 (1976) the Court stated:

> "In denaturalization cases the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence. The same burden has been imposed in expatriation cases. That standard of proof is no stranger to the civil law."

And in a footnote to that last sentence the Court wrote:

> "This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud . . ."

More recently, in *Addington v. Texas,* 99 S. Ct. 1804, 1808 (1979) Chief Justice Burger discussing the different standards of civil proof stated:

> "Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion. In criminal cases, on the other hand the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of erroneous judgment . . . The intermediate standard, which usually employs some combination of the words 'clear', 'cogent', 'unequivocal' and 'convincing', is less commonly used, but none the less 'is no stranger to the civil

> law' *Woodby vs. INS,* 385 U.S. 276, 285, 87 S. Ct. 483, 488, 17 L.Ed. 2nd 362 (1967). See also McCormick Evidence Sec. 320 (1954); 9 Wigmore, Evidence Sec. 2498, 3rd Ed. (1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used 'clear, unequivocal and convincing' standard of proof to protect particularly important interests in various civil cases."

In *Collins Securities Corporation v. S.E.C.,* 562 F. 2d 820, 824 (C.A.D.C. 1977), the court in reversing a decision by the Securities and Exchange Commission that a certain broker dealer violated the anti-fraud provisions of the Security Law because that decision was based on a preponderance of the evidence standard of proof, stated: "There are literally hundreds of cases decided by the United States courts of appeals in which the standard applied in civil fraud situations has been 'clear and convincing evidence'."

The Third Circuit itself in prior cases imposed the higher standard of proof where the charge was civil fraud.

In *Eastern Express, Inc. v. Mack Warehouse Corporation,* 326 F. 2d 554 (3rd Cir. 1964) the court said at page 566:

> "Moreover, since this is a fraud case, the trial court could find for the plaintiff buyer only if the proof of fraudulent misrepresentation was clear and convincing. A mere preponderance of

> evidence in favor of plaintiff's factual contention would not suffice."

In *Proctor v. Sagamore Big Game Club*, 265 F.2d 196 (3rd Cir. 1959) the court stated at page 202:

> "Fraud can be proven only by evidence which is clear, explicit and unequivocal."

In *Ratay v. The Lincoln National Life Insurance Company*, 378 F. 2d 209 (3rd Cir. 1967) the trial court was reversed and a new trial ordered where the jury was instructed that the burden in proving the elements of fraud was by a "fair preponderance of the credible evidence", the court at page 212 said that the party who alleges fraud:

> ". . must prove the facts on which his allegation rests by evidence that is 'clear, precise and indubitable.' "

The charge of civil fraud against petitioner in the instant case involved more than a mere matter of money. It seriously impugned and tarnished the reputation of an automobile dealer with an impeccable record.

As the trial judge's charge on the standard of proof in the instant case, affirmed by the court of appeals, was so clearly contrary to the long established federal rule, the grant of certiorari to review the judgment below is justified.

II.

The decision below affirming the award of $50,000 in punitive damages where only $5,200 in compensatory damages was awarded, seriously conflicts with the long established applicable Pennsylvania law.

The jury awarded plaintiff $5,200 in compensatory damages on the negligence count, which consisted of costs of repair and substitute transportation. There were no personal injuries involved nor was the automobile involved in any collision. The Pennsylvania law with respect to the measure of punitive damages is well summarized in a lower court opinion in *Hannigan v. S. Klein's Department Store,* 1 D. & C. 3rd 339 (Phil. Ct. Comm. Pleas, 1976), which opinion was affirmed per curium by the Pennsylvania Superior Court in *Hannigan v. S. Klein's Department Store,* 371 A.2d 872 (Pa. Super. 1976). In that case the lower court stated at pages 353-354:

> "There is no set formula for setting punitive damages. An upper limit was indicated in *Voltz v. General Motors Acceptance Corp.*, 332 Pa. 141, 2 A.2d 697 (1938), where punitive damages almost treble the actual damages were held to be excessive. On the other hand in *Certified Laboratories of Texas, Inc. v. Rubinson,* 303 F. Supp. 1014 (E.D. Pa. 1969), the federal court, applying Pennsylvania law, awarded damages double the compensatory damages, and in *Arye v. Dickstein,* 337 Pa. 471, 12 A.2d 19 (1940), the Pennsylvania Supreme Court reduced an award for punitive damages to an amount equal to compensatory damages. . . .See, e.g., *Hughes v. Babcock,* 349 Pa. 475, 37 A. 2d 551 (1944); *Rider v. York Haven Water & Power Co.,* 251 Pa. 18, 95 Atl. 803 (1915), after retrial, 255 Pa. 196 (1916); *Esmond v. Liscio,* 209 Pa. Superior Ct.

200, 224 A. 2d 793 (1966); *Murphy v. Cleland Simpson Co., Inc.*, 68 Lack. 58 (1967).

> Therefore, although we found that the amount of the award for punitive damages was not improper as a matter of law, we felt that an award in an amount half the compensatory damages was more in conformance with Pennsylvania case law. Accordingly, we ordered the punitive damages reduced from $52,500. to $17,500."

In *Voltz v. General Motors*, 332 Pa. 141, 144, 145 (1938), cited in the above opinion, the Supreme Court of Pennsylvania although not questioning the lower court's characterization of the defendant's conduct as "outrageous and high-handed", reduced an award of punitive damages from $2,500 to $1,000 where the actual damages amounted to $859.73.

In *Hughes v. Babcock*, 349 Pa. 475, 37 A. 2d 551 (1954) also cited in the above opinion, the jury returned a verdict for plaintiff in the sum of $2,500 for compensatory damages and $5,000 in punitive damages and the lower court ordered a remittitur of $2,000 of the punitive damages. The Supreme Court further reduced punitive damages from $3,000 to $1,000. The Supreme Court after concluding the evidence was certainly sufficient to permit a finding of punitive damages said at pages 480, 481:

> "We believe . . . that the verdict for punitive damages, even as remitted to $3000.00 is excessive. Although there is no fixed rule governing the amount which should be awarded as exemplary damages, it must not be disproportionate to the award of compensatory damages."

The most recent appellate pronouncement with respect to the allowable amount of punitive damages was made by the

Pennsylvania Superior Court in *Golomb v. Korus,* 396 A. 2d 430, 431 (1978) where the Court in citing *Hughes v. Babcock, supra,* and earlier Pennsylvania Supreme Court cases stated:

> "Punitive damages may not be disproportionate to the compensatory damages."

In the instant case the trial judge in his opinion allowing $50,000 in punitive damages acknowledged that the award of $50,000 in punitive damages where the compensatory damages awarded were only $5,200 was, "so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law."

It is clear from the examination of the Pennsylvania authorities that no Pennsylvania court would have approved the award of punitive damages of $50,000 where compensatory damages were only $5,200.

The clear disregard of the Pennsylvania law with respect to the amount of punitive damages by the court of appeals in affirming the award of punitive damages in the instant case was such a clear disregard of Pennsylvania law and the decisions of the United States Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny that the grant of certiorari to review the judgment below is justified.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the court of appeals in the instant case.

Respectfully submitted,

s/ Benjamin R. Jones
Dilworth, Paxson, Kalish
& Levy

s/ Milton S. Lazaroff
Techner, Rubin, Shapiro,
Slass & Lazaroff
Attorneys for Petitioner

APPENDIX

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1751 & 79-2108

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.,

Appellant

(E.D. Pa. Civil No. 77-4143)

Present:

SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and SLOVITER, *Circuit Judges,** and Gerry, *District* Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* Judge Higginbotham did not participate in the consideration of this matter.

** Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: April 9, 1980

Judges Adams and Rosenn would grant rehearing.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 17, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1751 and 79-2108

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 77-4143)

Submitted Under Third Circuit Rule 12(6)

March 17, 1980

Before: ALDISERT and GIBBONS, *Circuit Judges,* and GERRY, *District Judge.**

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

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* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

Judgment

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert

Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: Mar 17, 1980

MEMORANDUM AND ORDER (FILED APRIL 5, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

vs.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

Newcomer, J. April 4, 1979.

The defendant has moved for judgment notwithstanding the verdict, or in the alternative for a new trial. Most of the defendant's arguments do not require discussion, and the defendant's motion will be denied, but the Court finds that it will be required to amend the judgment in certain respects.

The defendant first argues that the verdict on the odometer count of the complaint must be overturned. The Court may not have come to the same conclusion that the jury did on the issue, but reasonable minds could certainly differ as to whether the plaintiff had proved its case. Abundant evidence supports the jury's verdict. Judgment n.o.v. is therefore not warranted.

The Court charged the proper standard of proof on the odometer count. "Fraud" was not in issue; "intent to defraud" was. The defendant did not point to any case which has applied a higher than normal standard of proof in an action under 15 U.S.C. §1989, and the Court cannot infer that Congress intended that a higher burden of proof should be placed on such actions. In the absence of any contrary authority, the Court

must apply the usual civil standard of proof, i.e. proof by a preponderance of the evidence.

The defendant argues that the Court should have granted a mistrial when the plaintiff's counsel mentioned the amount sought in the *ad damnum* clause of the complaint. The Court carefully and repeatedly instructed the jury to disregard the remark and the Court is confident that the jury was able to do so. Refusal to declare a mistrial was not error. *Garrett v. Faust,* 183 F.2d 625 (3d Cir. 1950); *Bowers v. Pennsylvania R.R. Co.,* 281 F.2d 953 (3d Cir. 1960); 58 Am Jur 2nd, *New Trial,* §56, n.12.

The defendant argues that the jury should have been charged in accordance with Restatement of Torts, Section 909, as to the facts that must be found before an employer may be held liable for punitive damages for the acts of its employees.

The defendant is incorrect in its reading of the law. A corporation may be held liable for punitive damages for the act of its servant acting within the scope of his authority. *Chuy v. The Philadelphia Eagles Football Club,* Nos. 77-1411 and 77-1412, (3d Cir., March 9, 1979) (Slip Opin. at 20); *Skeels v. Universal CIT Credit Corp.,* 335 F.2d 846 (3d Cir. 1964). All the acts proved in this case were clearly within the scope of such authority.

In any event, the Court's refusal to charge on the point was not objected to with sufficient specificity for the Court to be properly apprised of the claimed error. Rule 51, F.R.Civ.P.

One of the defendant's objections to the verdict is meritorious. The jury returned a verdict of $125,000. for punitive damages for gross negligence, despite having awarded but $5,200 in actual damages for negligence. The Court charged the jury

that an award of punitive damages must be reasonably related to any actual damages awarded. (n.T. 4-225). *Hughes v. Babcock*, 349 Pa. 475 (1944).

The Court has found no Pennsylvania case which has approved punitive damages in an amount approaching twenty-five times the actual damages sustained. Admittedly, a multiplier is not the best indicator of the propriety of the verdict, notwithstanding some early cases that implied that it is. Cf. *Thompson v. Swank*, 317 Pa. 158 (1934). Each case involves unique facts, and ideally, "the jury fixes the amount of such damages (which are in no sense compensatory but purely penal in nature) without yardstick, subject only to reduction by the court if deemed excessive under the circumstances of the particular case." *International Electronics Co. v. N.S.T. Metal Products Co., Inc.*, 370 Pa. 213, 225 (1952). Nevertheless, as a matter of law, the punitive damages awarded here were excessive and not "reasonably related" to the actual damages.

This Court adopts the approach to this issue set forth in Judge Fullam's learned opinion in *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D. Pa. 1971), *rev'd on other grounds*, 476 F.2d 471 (1973):

> "[I]t is my view that the concept of reasonable relationship between a punitive award should vary, depending upon (a) the egregiousness of the defendant's wrongful conduct and (b) the relative generosity of the compensatory award." 329 F. Supp. at 1170.

In this case the plaintiff's evidence, if believed, established a wreckless, life-threatening indifference on the part of the defendant to the safety of Mr. Dervaes and his passengers. The jury could properly have found that the conduct was egregious.

Memorandum and Order (Filed April 5, 1979)

In *Chuy v. Philadelphia Eagles Football Club,* 431 F. Supp. 254 (E.D. Pa. 1977), aff'd, Nos. 77-1411 and 77-1412 (3d Cir., March 9, 1979), Judge Becker approved an award of $60,590.96 in punitive damages above an award of $10,000 in actual damages. There, the defendant's staff doctor made statements to the press to the effect that the plaintiff had a fatal disease which, in fact, he did not have. Judge Becker found that "the size of the award permissibly reflects a concern that the kind of conduct found to have taken place requires a punishment which will chill the recurrence of similar conduct." 431 F. Supp. at 271.

The conduct detailed in *Chuy, supra.*, was egregious, but not life-threatening. The conduct in this case justifies an award proportionately larger than the amount approved there (although the absence of actual personal injury to Mr. Dervaes holds down the figure somewhat). The Court finds that, on an award of compensatory damages of $5200 for negligence (which the Court believes to have been approximately accurate), the jury might properly have awarded "reasonably related" punitive damages in the sum of $50,000.

Obviously, the standard for determining what punitive damages are "excessive" is no more precise than the standard for determining what punitive damages are proper in the first place. However, the "reasonably related" limitation is a legal constraint that cannot be ignored. The jury's verdict was properly in accord with all of the factors that must be considered in awarding punitive damages, except that the award was not reasonably related to the actual damages.

The Court heard the same evidence of the defendant's misconduct that the jury heard. The most likely explanation for the discrepancy between the Court's conclusion and the jury's is that the Court considers itself constrained by the "reasonably related" standard — it does not appear, realistically, that the jury accorded that standard much, if any, consideration.

Memorandum and Order (Filed April 5, 1979)

The amount of punitive damages that the Court considers appropriate is, so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law. Considering the egregiousness of the defendant's conduct and the deterrent purposes of punitive damages, an award of punitive damages in the amount of $50,000 is reasonably related to the actual damages. However, $50,000 is the maximum amount that a reasonable juror could have found to have been reasonably related to the actual damages found in this case.

The Court will not order a remittitur of the excess damages with a new trial as an alternative. A remittitur is proper only where the jury's award is directly and seriously contrary to the facts. The Court finds that the compensatory award was reasonable; only the punitive award was excessive. In the Court's opinion, a second jury, on these facts, could return a maximum amount, as a matter of law, of $50,000 in punitive damages for gross negligence. Where only the question of "reasonable relationship" between the two awards is at issue, a court may reduce the punitive award without ordering a new trial as an alternative. *Hughes v. Babcock, supra.*, 349 Pa. at 481.

The plaintiff is entitled to costs and attorney's fees for the prosecution of this action. 15 U.S.C. §1989(a)(2). By separate Order the Court will schedule a hearing on the question of the proper amount of attorney's fees to be awarded in this case, and the judgment will be amended thereafter accordingly. See, generally, *Lindy Brothers, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *following* remand, 540 F.2d 102 (3d Cir. 1976).

Costs will be taxed against the defendant by the Clerk of Court. The plaintiff shall file a bill of costs which the Clerk will first consider and then allow in whole or in part. Rule 38, Local

Memorandum and Order (Filed April 5, 1979)

Rules of Civil Procedure. After the conclusion of the hearing on attorney's fees the judgment will be formally amended to reflect the reduction in the award of punitive damages, and the addition of attorney's fees and costs.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

ORDER

AND NOW, to wit, this 4th day of April, 1979, upon consideration of the defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, it is hereby Ordered that the motion is DENIED.

The judgment will be amended at a later time to reflect an award of attorney's fees and costs, and, in accordance with the accompanying Memorandum, a reduction in the award of punitive damages to the amount of fifty thousand dollars ($50,000).

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

MEMORANDUM AND ORDER (FILED JULY 3, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

Newcomer, J July 2, 1979

Upon consideration of the plaintiff's motion for attorneys' fees, the Court makes the following findings:

1. The plaintiff was the prevailing party in an action brought under 15 U.S.C. §1981, *et. seq.*, which prohibits sale of a motor vehicle with an odometer known to be incorrect, unless that fact is revealed to the buyer. 15 U.S.C. §1989(a)(2) provides for the award of reasonable attorneys' fees to a plaintiff who establishes the defendant's liability under the statute. In this case a jury awarded the plaintiff a verdict of $4,500 which was trebled by the Court pursuant to 15 U.S.C. §1989(a)(1).

2. To arrive at the reasonable fee award for the services of the plaintiff's attorney in prosecuting its odometer claim, the Court must find the reasonable hourly rate for the attorney's services and multiply it by the number of compensable hours expended by the attorney. After this "lodestar" amount is found, the Court can increase or decrease it to reflect the contingent nature of success and the quality of the attorney's work in the case. *Lindy Bros. Builders, Inc. of Philadelphia v. American*

Radiator and Standard Sanitary Corp., 487 F. 2d 161 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 540 F. 2d 102 (3d Cir. 1976) (*Lindy II*).

3. This case is complicated somewhat by the presence of additional claims (i.e. Fraud and Negligence), upon which the plaintiff also prevailed at trial. Plaintiff's counsel's records of time worked understandably do not distinguish between time spent on the odometer claims and time spent on the plaintiff's other claims. The Court held a hearing to determine what amount of time was actually spent on the odometer portion of the case, which was compensable under 15 U.S.C. §1989.

4. The Court finds that plaintiff's counsel spent approximately 50% of his total billable time on the odometer portion of the case. The odometer issues were easily the most complex issues of the case, both legally and factually. The Court believes that more than half of the evidence adduced at trial related to the odometer claim, and it is apparent from counsel's affidavit in support of the motion for attorneys' fees that approximately half of his preparation time was spent on odometer-related issues. The defendant was unable to rebut that showing at hearing, and the Court finds plaintiff's counsel's affidavit to be entirely credible.

5. Plaintiff's counsel's affidavit is also entirely credible and unrebutted as to the total amount of time spent on the case. Counsel maintained a careful, professional log of his activities during the case. A review of the affidavit shows nothing out of the ordinary or excessive. The log shows that plaintiff's counsel spent 369 1/2 hours in out-of-court time, and 21 hours of in-court time. Counsel's billing rates are $70 per hour for out-of-court work, and $100 per hour for in-court work.

6. Plaintiff's counsel, Mr. Owens, has been practicing law for 8 years, approximately 4 of which have been spent as a

litigation specialist. The Court believes that counsel's billing rate is commensurate with the normal billing rate for attorneys of his experience and ability in the area, and finds those rates to be reasonable. Hence, the "lodestar" can be calculated by multiplying out-of-court billing rate and multiplying again by .5 (reflecting the amount of time spent on odometer issues). Similarly, the in-court-time must be multiplied by the in-court billing rate, and again by 50%, which is approximately the amount of in-court time devoted to odometer issues, when opening and closing statements, all arguments of counsel, and presentation of evidence is considered together. The Court calculates the "lodestar" amount as $13,982.50.

7. Before finally determining the actual fee to be awarded, two other factors must be considered: the quality of the attorney's work and the contingent nature of success. *Lindy I, supra.* In this case, the quality of counsel's work was excellent, and the obstacles against his establishing the odometer claim were formidable. Considering the testimony of the prior owners of the car presented by the defendant, the Court frankly might not have arrived at the same conclusion that the jury did, i.e. that the car had travelled more miles than were reflected on its odometer at the time it was sold to the plaintiff. Plaintiff's counsel did a good job of marshalling his proof and carrying his burden of pursuasion, and his use of witnesses who were experts on the subject of automobile wear patterns obviously required a significant investment of counsel's time. Nevertheless, the Court will not therefore increase the "lodestar" amount, for two reasons. First, it is not at all clear whether the contingent nature of success should be given extensive consideration where the statute contemplates awarding attorneys' fees only where the plaintiff has already prevailed, eliminating any contingency. Secondly, the Court must admit (as does plaintiff's counsel) that its conclusion that counsel spent 50% of his time on odometer issues is at best an approximation.

Memorandum and Order (Filed July 3, 1979)

8. Although the Court believes that plaintiff's counsel rendered highly professional service, the "lodestar" amount must be reduced somewhat on another basis. *Lindy I* "permits the court . . . to reduce the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 168-9 (3d Cir. 1975). Here, the plaintiff gained a verdict of $4,500 on his odometer count which was trebled, pursuant to statute, to $13,500. To award attorney's fees in an amount exceeding actual damages, trebled, would be to penalize the defendant to an extent not contemplated by Congress. On the other hand, it would be a rare case in which the actual amount of loss attributable to odometer fraud exceded the cost of pursuing the claim through trial, a fact of which Congress must have been aware. The Court must strike a balance which avoids unduly punishing the defendant, while avoiding penalizing plaintiff's counsel for the careful and thorough manner in which he prepared his case. The Court believes that a fee award of $9500 (slightly more than two-thirds of the "lodestar") is high enough to encourage the bringing of similar claims, yet low enough to avoid unnecessarily penalizing the defendant. The sum of $9500 amounts to "reasonable attorney fees" (15 U.S.C. §1989(a)(2) under all the circumstances of the case.

9. Plaintiff is also entitled to an award compensating it for the attorneys' fee of local counsel, Astor and Weiss. See Local Rule of Civil Procedure 10. Astor and Weiss billed the plaintiff for $840.00 for services rendered. That amount must be adjusted by the 50% figure discussed above, to the amount of $420.00. The Court finds that $420.00 is a reasonable amount for services rendered by local counsel with respect to the odometer issues.

10. The plaintiff shall be awarded attorneys' fees in the amount of $9,920.00.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Memorandum and Order (Filed July 3, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A.R.D. CORPORATION

V.

KEENAN MOTORS, INC.

CIVIL ACTION

NO. 77-4143

ORDER

AND NOW, to wit, this 2nd day of July, 1979, upon consideration of the plaintiff's Motion for the Award of Attorneys' Fees, and in accordance with the accompanying memorandum, it is hereby Ordered that the plaintiff is entitled to attorneys' fees in the amount of $9,920.00.

It is further Ordered that the plaintiff's various post-trial motions relating to discovery with respect to execution of judgment are DENIED; and the Court's Order staying the transfer of the record on appeal is hereby dissolved.

An amended final judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $79,626.00, plus costs as determined by the Clerk of Court.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1756

KEENAN MOTORS, INC.,

Petitioner,

v.

A. R. D. CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX TO BRIEF.

	Page
COUNTER STATEMENT OF QUESTIONS PRESENTED	2
COUNTER STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT	4
I. The Court Charged Properly When It Required Proof by a Preponderance of the Evidence on the Issue of an Intent to Defraud in an Action Grounded on a Federal Statute	4
II. Neither the Trial Court Nor the Court of Appeals Acted Contrary to Pennsylvania Law in Awarding Punitive Damages of $50,000 When Viewed in Light of All the Circumstances of the Case	23
CONCLUSION	26
APPENDIX:	
District Court Memorandum and Order, April 4, 1979	1a
District Court Order, April 4, 1979	7a
District Court Memorandum and Order, July 2, 1979	8a
District Court Order, July 2, 1979	13a

TABLE OF CITATIONS.

Cases: Page

Addington v. Texas, 99 S. Ct. 1804 (1979) 21, 22
Collins Securities Corporation v. S. E. C., 562 F. 3d 820 (C. A. D. C. 1977) 21
Edgar v. Fred Jones Lincoln-Mercury, 524 F. 2d 162 (10th Cir. 1975) 13
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 26
Delay v. Hearn Ford, 373 F. Supp. 791 (D. S. C. 1974) 16, 19
Duval v. Midwest Auto City, Inc., 425 F. Supp. 1381 (D. Neb. 1977) 16, 17, 19
Hughes v. Babcock, 349 Pa. 475 (1944) 23, 26
Klein v. Pincus, 397 F. Supp. 847 (E. D. N. Y. 1975) 16
Nieto v. Pence, 578 F. 2d 640 (5th Cir. 1978) 17
Pepp v. Superior Pontiac GMC, Inc., 412 F. Supp. 1053 (E. D. La. 1976) 17
Rowoldt v. Perfetto, 355 U. S. 115, 78 S. Ct. 180 21
Stier v. Park Pontiac, Inc., 391 F. Supp. 397 (S. D. W. Va. 1975) 17
Woodby v. Immigration and Naturalization Service, 385 U. S. 276, 87 S. Ct. 483 (1976) 20, 22

Statutes:

15 U. S. C.:
§ 1981 17
§ 1989 ..... 2, 4
§ 1991 13
United States Constitution:
Fourteenth Amendment 21

IN THE

Supreme Court of the United States

October Term, 1979

No.

KEENAN MOTORS, INC.,

Petitioner,

v.

A. R. D. CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The respondent, A. R. D. Corporation respectfully prays that a writ of certiorari not issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1980 and on which a rehearing in banc was denied by order of the said court eight of the said judges having voted against a grant of rehearing on April 9, 1980.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Whether, in a claim under 15 U. S. C. § 1989 for knowingly and with intent to defraud, selling an automobile which had more miles on it than shown on its odometer, the Court of Appeals erred in affirming the trial judge's instruction to the jury that the intent to defraud under 15 U. S. C. § 1989 need be established only by a preponderance of the evidence as opposed to a higher standard of civil proof.

2. Whether the Court of Appeals, in a claim for compensatory and punitive damages under Pennsylvania law, erred in affirming an award of $50,000 in punitive damages where the jury found compensatory damages of $5,200 and Pennsylvania law requires that punitive damages be proportionate to and reasonably related to the compensatory damages when all the circumstances of the case are considered.

COUNTER STATEMENT OF FACTS.

In March of 1977, respondent, through A. Rene Dervaes, contacted Martin Keenan of Keenan Motors, petitioner, relative to Mr. Dervaes' desire to purchase a used Rolls Royce with low mileage from Keenan Motors (R. 64a). Mr. Keenan replied to this request that it was Mr. Dervaes' "lucky day" and that he, Mr. Keenan, had just taken in such a car on a trade (R. 64a). Mr. Keenan told Mr. Dervaes that the car was in "immaculate condition", that "the car had very low mileage on it", and that he, Mr. Keenan, "had driven it [the car] back" from Sunbury, Pennsylvania the weekend prior to this telephone conversation (R. 65a). Mr. Keenan also told Mr. Dervaes during this telephone conversation that Mr. Dervaes "was so fortunate to get a car with just 19,000 miles on it, being a '69" (R. 68a).

Within a few days, Mr. Tom Burton, Keenan's Rolls Royce sales manager, brought the 1969 Rolls to Mr. Dervaes for a test drive. During the course of that drive, Mr. Dervaes noticed a loud noise coming from the rear of the car. When Mr. Dervaes asked Mr. Burton about the noise, Mr. Burton replied, "It sounds like brake problems. We will have to fix that," (R. 69a-70a). Mr. Dervaes also mentioned to Mr. Burton that the brakes were soft and that "there was quite a little bit of slack," in the brakes (R. 70a). On the same day on which he saw the car for the first time, Mr. Dervaes agreed to purchase this car with the understanding that the bald tires would be replaced, the brakes would be repaired and certain other repairs would be completed (R. 72a, Exhibit P-1, R. 748a).

Mr. Dervaes took delivery of the car on March 24, 1977. He was told, in response to his specific question, that the brake repair work had been performed (R. 73a-

74a). On the date when Mr. Dervaes took delivery of the car, he also received a document entitled Odometer Mileage Statement which stated that the accurate mileage which this automobile had travelled was 19,880. Mr. Keenan signed this statement in behalf of Keenan Motors (Exhibit P-3, R. 789a).

Within two weeks of taking delivery, Mr. Dervaes returned the car to Keenan Motors with the complaint that the brakes still were not functioning properly (R. 90a, Exhibit P-5, R. 793a). The Internal Repair Order log, maintained by Keenan Motors, later showed no evidence that any repair work had been performed on the brakes as a result of this notification to Keenan of a brake problem (Exhibit P-5, R. 793a, R. 795a).

On April 22, 1977, having had title to the car for less than a month (approximately 5 days of which the car had spent in Keenan's repair shop), Mr. Dervaes once again was forced to return the car to Keenan for repairs (R. 95a, 96a). Included in the concerns expressed to Keenan on April 22, 1977 were the complaints about the continuing brake problems (R. 100a, 101a).

Jumping ahead and out of the sequence of events just a bit, Mr. Dervaes was billed $1,371.82 at the conclusion of the repair work by Keenan pursuant to this April 22, 1977 Repair Order (R. 97a, Exhibit P-6, R. 796a). Included in this bill, among other things, were charges for a new Rolls Royce muffler for $592.49 and various charges for a complete set of brake pads which allegedly were installed on the car (Exhibit P-6, R. 796a). The facts surrounding this new muffler are crucial and telling. Petitioner has never attempted to rebut the following. Mr. Dervaes was told by Keenan that the car needed a brand new muffler, that a Rolls Royce muffler would be used to repair his car and that the muffler cost $592.49 (R. 122a,

124a). The fact is that Keenan did not put a Rolls Royce muffler on the car, but rather substituted a muffler of substantially lower value (R. 188a, 189a, 192a). Keenan offered not one shred of evidence through the course of the trial to contradict or to attempt to explain away this fraud. Respondent proved this point at trial with the testimony of petitioner's parts manager (R. 188a-192a).

Respondent also proved that Keenan did not, in fact, replace the car's brake pads, contrary to petitioner's assertions and its April 22, 1977 Repair Order (Exhibit P-6, R. 797a). Keenan represented that it had made this repair and charged Respondent for the parts and labor allegedly installed and expended in replacing same (Exhibit P-6, R. 797a). To be sure, the proof of this fact is not as positive as was the case with the muffler.

Mr. Dervaes had taken the car to Mr. George Knox, of Knox's Automotive, West Chester, Pennsylvania for repair, subsequent to June of 1977. This occurred after respondent's relationship with petitioner had totally collapsed. Mr. Knox is a mechanic of some 32 years experience, who himself is a Rolls Royce owner, active in the Rolls Royce Owners' Club and a man of substantial credentials, education and respect in his field (R. 195a, 199a, 195a-202a). The court below accepted Mr. Knox as an expert in the field of automotive maintenance and repair (R. 205a). As a result of the deteriorated condition of the brakes when the car was brought to him for repairs, Mr. Knox had to replace all the brake pads on the car (R. 104a). The car had only travelled 5,800 miles between the time Keenan claims to have replaced the brake pads and the time Mr. Knox replaced them. Mr. Knox testified that Keenan did not replace the brake pads as it claimed, some 5,800 miles earlier (R. 214a).

Respondent offered evidence of further fraud in conjunction with Keenan's claim of having overhauled the

car's height control system. When Mr. Dervaes brought the car to Keenan for repairs on April 22, 1977, he mentioned to Keenan that ". . . every time I went over a bump or had somebody in the back seat of the car I hit (had) this bottoming out, this thud all the time," (R. 108a). Keenan responded by charging Respondent $140 for "overhauling the height control system," (R. 108a, Exhibit P-6, R. 796a). Respondent's evidence showed that no such overhaul of the height control system ever took place. Instead, Keenan inserted a device known as "spring lifts" into the rear springs. Keenan's witness and its chief Rolls Royce mechanic, a Mr. Thomas Nerlinger, has characterized this "spring lift" as ". . . a cheap way of leveling the rear of the car," (R. 469a). Respondents's witnesses testified that based upon their inspection of the height control system, no such overhaul took place (R. 345a).

Returning to the sequence of events, subsequent to April 22, 1977, Mr. Dervaes testified that he was continuing to have problems with the brakes of the car (R. 115a). An instrument panel light which has come to be known as the "left side brake warning light" was blinking on. On June 9, 1977, Mr. Dervaes turned the car over to Keenan for repair, with the request that Keenan repair whatever condition was causing the left side red brake warning light to come on (R. 111a, 117a, Exhibit P-13, R. 807a). When the car was returned to Mr. Dervaes, the left side brake warning light no longer flashed its red warning (R. 118a). Keenan charged him $10 for the "repair" of whatever problem was causing this light to flash its warning (Exhibit P-12, R. 804a).

Just two weeks later, on June 23, 1977, Mr. Dervaes once again turned the car over to Keenan for repairs. At this time, the right side red brake warning light was

"coming off and on continually" and Mr. Dervaes sought the repair of whatever condition was causing this right side brake warning light to flash its warning (R. 125a). Keenan again charged $10 for the "repair" and, as with the left brake warning light, the right brake warning light did not blink its warning after Keenan personnel worked on the car on this June 23, 1977 date (R. 126a, Exhibit P-14, R. 808a).

Three or four days later, Mr. Dervaes was driving the car over a hilly country road, ". . . and I was coming up over a hill and I put my brake on to slow down coming up over the top of the hill and the brake pedal went to the floor and I didn't have any brakes" (R. 126a). He had been travelling about 40 miles per hour (R. 126a). Mr. Dervaes managed to bring the car to a stop without crashing. Neither brake warning light had flashed its alert (R. 127a). They had allegedly been repaired by Keenan Motors within about two (2) weeks of this incident (R. 127a).

The next day, Mr. Dervaes returned the car to Keenan Motors one last time for repairs of the brakes (R. 130a). About three (3) days later Mr. Dervaes was returning from a picnic with his wife. As his wife alighted from the car, she said "My God, Rene, the car is on fire," (R. 131a). "Flames were shooting out the back wheels" (R. 131a) of the right rear wheels of the car. At the time of the fire, neither brake warning light flashed red or "on" at any time (R. 133a).

A few days later, Mr. Dervaes arranged to have the car towed to Allen Carter's Rolls Royce Repair Service in Wilmington, Delaware. Mr. Carter is a Rolls Royce mechanic of some 40 years experience (R. 271a). He was an authorized Rolls Royce Service Representative for almost 20 of those 40 years (R. 271a). The court accepted Mr. Carter as an expert witness in the field of maintenance

and repair of Rolls Royce Automobiles (R. 274a). The first thing which Mr. Carter did was to conduct an inspection of the car (R. 276a). Prior to this inspection, Mr. Dervaes had described to Mr. Carter the work which Keenan Motors had claimed to have performed on the car (R. 275a). Following his inspection of the car, Mr. Carter called Mr. Dervaes and told him, "You better come and take a look because there was nothing visible that I could see that would indicate this work had been done a couple of months previous to the time I saw him" (R. 276a). When asked what he found when he visually examined the brake failure warning lights, Mr. Carter replied, "Well, they were disconnected. Somebody disconnected those" (R. 277a). Mr. Carter explained that the purpose of this warning system is to alert the driver to the fact that ". . . he has lost his power and he has no brakes on that particular system . . ." (R. 278a). With the warning lights disconnected, there is no way at all a driver could know that he had problems with his hydraulic braking system (R. 279a). Mr. Carter stated categorically that the brake warning lights were intentionally disconnected (R. 281a). As might be expected, the mechanics of Keenan Motors who worked on Mr. Dervaes' auto stated with equal force that they had never done any such thing (R. 517a).

One of Keenan's mechanics, a Mr. Gerace, was asked on cross-examination to explain in detail the repair which he says he performed to the right side brake warning light on June 23, 1977 for which Mr. Dervaes had been charged $10 (R. 529a-537a). Mr. Gerace said that because of a fray which had developed he spliced a piece of wire into the right side brake warning light wire (R. 529a-532a). He said that he accomplished this repair by unwrapping a wiring harness which encases a number of wires for protection (R. 530a-531a). On rebuttal, Mr. Carter was

asked if he had examined the car to determine if there existed any evidence that this alleged "splice" had been performed (R. 645a). Mr. Carter found "no evidence whatsoever that the splicing 'repair' had been performed," (R. 645a-646a). Between the time of the alleged repair of the left and right warning lights and the time Mr. Carter discovered that these wires were disconnected, the warning lights on the dash never lighted (R. 118a, 126a, 127a, 133a).

Mr. Knox testified extensively on the extreme state of disrepair of the braking system (R. 206a, 209a, 211a, 219a). He testified that certain vital brake components were badly deteriorated and that this condition existed during the time frame when Keenan Motors was supposed to have performed the necessary brake repairs on this vehicle (R. 221a-222a, 227a-230a). Mr. Knox pointed out that according to the Rolls Royce repair procedures, the symptom originally described by Mr. Dervaes in March and April of 1977 called for the inspection of the "caliper pistons" (R. 227a-228a). Mr. Knox testified that it would have been obvious that these brake parts were in need of replacement and repair when Keenan Motors was responsible for repairing these brakes (R. 230a). Mr. Carter gave similar testimony about the extensive state of disrepair of the brakes while touching on other components of the braking system as well (R. 289a). Mr. Carter attributed the cause of the fire to sticking of the calipers and the pistons and to the dirt and rust that had accumulated thereon (R. 288a). He stated that had Keenan Motors conducted this rudimentary examination of the brake calipers which Mr. Knox had testified about, the conditions which caused the fire would have been discovered by Keenan Motors (R. 290a-291a).

On the question of the excess mileage which the car had travelled beyond the 19,880 miles which Keenan had

represented, respondent called George Knox, Allen Carter, Joe Davidson and Thomas Rossiter. Mr. Knox testified that based upon an accumulation of items he observed on the car, all of which he set forth in detail in his testimony (R. 237a-241a), in his judgment, the car had travelled "two or three times as many miles" more than reflected on the odometer (R. 241a). Mr. Carter testified that in his judgment the odometer did not accurately set forth the mileage the car had actually travelled and that the mileage on the car was much higher than that showed on the odometer (R. 293a).

Mr. Davidson was respondent's primary witness on the excess mileage—odometer roll-back portion of the case. Mr. Davidson testified that he examined the car on July 15, 1977, September 22, 1978 and on September 23, 1978 (R. 632a). He examined the rear springs of the car and found physical evidence that they had worn out, and that they had been worn out for an extended period of time (R. 341a-344a). Mr. Davidson testified that rear springs wear out because of high mileage (R. 352a). He also noted that "the rear shock absorbers were shot" and that such is also an indication of high mileage (R. 352a). In arriving at his conclusion and as evidence in further support thereof, Mr. Davidson testified that he reviewed the repair history of the car and the repair orders, all of which were in evidence as exhibits at the trial (R. 351a). Based upon all of these factors, Mr. Davidson testified that in his judgment the car had travelled 30,000 to 35,000 more than reflected on the odometer (R. 354a).

Perhaps the most significant and dramatic piece of evidence was the left front (driver's side) carpet from the car in question. This original car rug had been worn clear through the wool piling and the heavy jute backing; a hole large enough to fit two fingers through with ease (R. 634a). Mr. Davidson testified that based upon this badly worn

carpet (R. 635a) his testimony as to the excess mileage estimate of 30,000 to 35,000 miles was very conservative, and it firmly convinced him of the accuracy of his beliefs as to excess mileage (R. 635a).

Mr. Davidson testified that he dismantled and examined the speedometer head of this vehicle and photographed its component parts on July 15, 1977 (R. 357a). Mr. Davidson testified to having found physical evidence, "bright, sharp scrape gouging marks", indicating that the speedometer housing had been recently opened, giving access to the number dials of the odometer (R. 364a-366a, 412a). These markings were visible in photographs taken by Mr. Davidson and introduced into evidence (R. 364a).

Mr. Davidson testified on the nature of the Smith instrument, the manufacturer of the odometer in question, and the way in which the numbers on its face reflecting mileage would be changed. He noted that resetting these numbers is as simple and clean as setting one's watch (R. 369a). Mr. Davidson then testified that based upon a number of factors the odometer "had been reset to lower mileage than was on the car", and that this resetting had been performed by the petitioner (R. 370a-372a).

REASONS FOR DENYING THE WRIT.

I.

The Court Charged Properly When It Required Proof by a Preponderance of the Evidence on the Issue of an Intent to Defraud in an Action Grounded on a Federal Statute.

A.

Petitioner raised the issue now before this Court in the context of its post trial motions to the trial court. In its Memorandum and Order filed April 5, 1979, the trial court responded to Petitioner's contentions thusly:

> The defendant first argues that the verdict on the odometer count of the complaint must be overturned. The Court may not have come to the same conclusion that the jury did on the issue, but reasonable minds could certainly differ as to whether the plaintiff had proved its case. *Abundant evidence supports the jury's verdict.* Judgment n.o.v. is therefore not warranted.
>
> The Court charged the proper standard of proof on the odometer count. "Fraud" was not in issue; "intent to defraud" was. The defendant did not point to any case which has applied a higher than normal standard of proof in an action under 15 U. S. C. § 1989, and the Court cannot infer that Congress intended that a higher burden of proof should be placed on such actions. In the absence of any contrary authority, the Court must apply the usual civil standard of proof, i.e., proof by a preponderance of the evidence. (Emphasis supplied.)

This action was grounded on a federal statute and sought neither a common law nor a state remedy. (Federal

Motor Vehicle Information and Cost Savings Act, specifically, 15 U. S. C. § 1981 *et seq.*)

In *Edgar v. Fred Jones Lincoln-Mercury,* 524 F. 2d 162 (10th Cir. 1975), the Court reviewed the congressional intent pertinent to the Act. This review relates by inference to the issue presently before this Court:

> The congressional intent is set forth in 15 U. S. C. § 1991 as follows:
>
> > This subchapter does not—(1) annul, alter, or affect the laws of any State with respect to the disconnecting, altering or tampering with odometers with the intent to defraud * * * except to the extent that those laws are inconsistent with any provision of this subchapter and then only to the extent of the inconsistency. 15 U. S. C. § 1991.
>
> The federal statute when it speaks of inconsistent provisions is talking about state statutes which have to do with disconnecting, altering or tampering with odometers with the intent to defraud, so it has in mind state laws specifically dealing with the odometer subject. It does not refer to a common law remedy in fraud. So, there is no basic conflict between the law of Oklahoma and the federal statute. Quite apart from the express provision, 15 U. S. C. § 1991, it is clear from the legislative history that Congress' apprehensions had to do with state provisions that were less stringent than the statute which was being enacted. See Statement of Rep. Staggers, 118 Cong. Rec. 18218 (May 22, 1972); Statement of Rep. Broyhill, 118 Cong. Rec. 18219 (May 22, 1972); 1972 USCCAN 2692, 3970-72. (Id. at 165)

Representative Staggers of West Virginia noted that: "Title IV (15 U. S. C. § 1981 et seq.) is intended to curb this practice (odometer resetting) on a *national level.*" 118 Cong. Rec. 18218 (May 22, 1972) (Emphasis supplied). Representative Broyhill of North Carolina noted:

> Although the penalties imposed are civil in nature, the creation of a Federal law on the subject, bolstering those of the States, and particularly the information requirements, should deter the practice of odometer tampering. 118 Cong. Rec. 18219 (May 22, 1972).

With such as background and in the absence of contrary case law, the trial court's position is understandable and appropriate. To the extent to which a burden of proof greater than a preponderance of the evidence which is imposed by the body of state law makes it more difficult for a car buyer to achieve a recovery under the Act, such a standard would be contrary to the language of the statute and congressional intent. Application of a greater burden of proof would appear to be inappropriate. Further, it should be pointed out that the trial court was not unmindful of the standard of proof Pennsylvania law suggests on the issue of fraud. The second count of respondent's complaint alleged "Fraud and Deceit." Evidence was presented on this allegation and the jury returned a verdict in respondent's favor on these allegations (R. 9a). In charging the jury on this issue of fraud, the court was careful to point out that the standard of "clear, precise and indubitable" evidence applied (R. 726a). Finally, the trial court's judgment noted above that: "Abundant evidence supports the jury's verdict" should help to allay any fear in that respect.

B.

Even if the trial court did charge to a less stringent standard of proof then might have been appropriate (a

point not conceded), such an error had no effect on the outcome on the case.

This argument is one which respondent believes is supported both by simple logic and the case law in this area. The trial court's charge in effect required a jury finding of "actual knowledge" by the car dealer of the fact of excess mileage. Having "actual knowledge" of the truth, any untruthful statement, of necessity, imputes an intent to defraud.

Interrogatory No. 1 read: "At the time of sale to A. R. D. had the Rolls Royce sold to A. R. D. by Keenan Motors travelled more miles than were recorded on the odometer?" The jury answered, "Yes." (R. 749a). Interrogatory No. 2 read: "If the answer to Interrogatory No. 1 is 'yes', did Keenan Motors know that the odometer was incorrect?" The jury answered, "Yes." (R. 749a).

By answering Interrogatories 1 and 2 affirmatively, regardless of the standard to which the jury was charged in connection with the "intent to defraud" issue, it would have been patently improper, based on this record, for the jury to find in response to Interrogatory 3 that the car dealer had not acted with an intent to defraud. Interrogatory No. 3 read: "If the answer to Interrogatory No. 2 is 'yes', did Keenan Motors sell the car to A. R. D. with intent to defraud?" The jury again replied, "yes." (R. 749a).

The "simple logic" which respondent touts is that by answering Interrogatories 1 and 2 in the affirmative, the jury officially equipped the petitioner with actual knowledge of the excess mileage. For the petitioner to sign an Odometer Mileage Certification (R. 789a) certifying mileage at 19880 without informing the car buyer that the odometer was inaccurate is fraud *per se*, in the absence of any explanation. The record, of course, contains no such explanation.

The court in *Delay v. Hearn Ford,* 373 F. Supp. 791, 796 (D. S. C. 1974) dealt with analogous facts.

> All that is required of a purchaser, before recovery will be allowed, is that a change in the odometer reading has occurred and that the seller has failed to disclose the change. An intent to defraud arises from the proof of the foregoing in the absence of an explanation of the odometer change.

See to the same affect *Klein v. Pincus,* 397 F. Supp. 847, 851 (E. D. N. Y. 1975) and *Duval v. Midwestern Auto City, Inc.,* 425 F. Supp. 1380, 1386 (D. Neb. 1977).

In all events, respondent and not petitioner is the party who was prejudiced by the trial court's charge in this area. An analysis of the court's charge shows that the court did not instruct the jury that "constructive knowledge" on the part of the car dealer would be a sufficient basis for a finding against it. It is important to an understanding of this analysis to briefly touch upon the legislative history and the more prominent cases which discuss constructive knowledge and the intent to defraud related to Section 1988. The Senate Committee Report pertinent to Section 1988 of the Act notes:

> The test of "knowingly" was incorporated [in Section 1988] so that the auto dealer with expertise now would have an affirmative duty to mark "true mileage unknown" if, in the exercise of reasonable care, he would have reason to know that the mileage was more than that which the odometer had recorded or which the previous owner had certified. 1972 U. S. Code, Cong. & Adm. News, pp. 3960, 3971-72. (Emphasis supplied.)

Consequently, when considering this legislative history, it is apparent why the vast majority of courts have

not been persuaded by defendants' arguments that their failure to give the consumer notice of the accurate mileage was at worst a negligent act without actual knowledge, and therefore not cognizable under Section 1981 et seq. *Pepp v. Superior Pontiac GMC, Inc.*, 412 F. Supp. 1053, 1055-56 (E. D. La. 1976) (Court found intent to defraud inferred from gross negligence); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977) (Court held transferor with constructive knowledge liable without discussing intent to defraud); *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S. D. W. Va. 1975) (Court held that transferors with constructive knowledge may be liable without discussing intent to defraud).

The Court of Appeals for the Fifth Circuit vacated, reversed and remanded a verdict against a plaintiff in a case tried under the same Act and Sections now before this Court. The district court had found that the defendant had no actual knowledge of the odometer irregularity, and that the defendant had not intended to defraud. The Fifth Circuit stated that it was "clear" that if defendant had constructive knowledge, a violation of Section 1989 exists. On the issue which necessarily follows, i.e., the existence of an "intent to defraud", the Fifth Circuit reviewed the cases discussed above:

> We hold that a transferor who lacked actual knowledge may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that a vehicle's actual mileage is unknown. A transferor may not close his eyes to the truth. If a transferor reasonably should have known that a vehicle's odometer reading was incorrect, although he did not know to a certainty the transferee would be defrauded, a court may infer that he understood the risk of such an occurrence. *Nieto v. Pence*, 578 F. 2d 640, 642 (5th Cir. 1978).

The relevance at this juncture of this concept of "actual knowledge" vs. "constructive knowledge" is that the charge to the jury by the court allowed the jury to find against Keenan only if the jury found that Keenan had actual knowledge that the car had travelled more miles than recorded. As noted above, the district court for the Western District of Pennsylvania, the Court of Appeals for the Fifth Circuit and numerous other district courts have inferred an intent to defraud in circumstances where only constructive notice was found. In the case at bar, the charge required and the verdict showed a finding of actual knowledge on the part of the petitioner.

A careful reading of the charge indicates that the court made no explanation or meaningful mention of the "constructive knowledge" concept discussed at length hereinbefore (R. 722a, 723a). The court expressed the concept of knowledge solely in the framework of "actual knowledge". In no instance did the court say "knew or had reason to know" or some similar verbage to establish the sense that Keenan's constructive knowledge would be sufficient. Any lingering doubt that the jury believed that it had to find actual knowledge on the part of Keenan should be quieted by Interrogatory No. 2 which the jury had with it during deliberations, and must certainly have influenced the members of the jury the most.

> If the answer to Interrogatory No. 1 is "yes", did Keenan Motors *know* that the odometer was incorrect? (Emphasis supplied)

Again, not the slightest suggestion that anything other than actual knowledge was acceptable.

Therefore, respondent believes that it, and not the petitioner stood to suffer by the court's charge here. The court selected an extremely high standard, requiring a more stringent level of proof than Congress, the Act and

the vast majority of courts have required. The jury found that the car had in fact travelled more miles than the odometer showed and that Keenan had actual knowledge of this fact. Selling a car without first informing the buyer that one has actual knowledge that the miles travelled exceeded those shown on the odometer, must, in the absence of an explanation, lead to a conclusion of an intent to defraud. *Duval, supra,* at p. 1386, and *Delay, supra,* at pp. 795 and 796.

Therefore, even if petitioner was correct and the court erred in failing to charge that the "intent to defraud" must be established, not by a preponderance but by evidence that is clear, precise and indubitable, the error, if any, was harmless and of no effect.

C.

The heart of petitioner's argument to this Court, is that the charge lodged against petitioner is more than a matter of money and that the reputation of petitioner might be seriously impugned and tarnished. As support, the petitioner asserts that it is an automobile dealer of "impeccable reputation." (Petition, Page 9). What petitioner fails to advise this Court is that the verdict of the jury in this same case found against the petitioner on a separate issue of fraud alleged by respondent. Proof at trial showed that the petitioner had sought and received authorization from the owner of the car to replace a worn muffler on the subject vehicle with a standard Rolls Royce part. The proof also showed that the car dealer then substituted a non-Rolls Royce part rather than installing the genuine Rolls Royce part in the car. The substituted part was substantially less costly than the Rolls Royce part. However, the petitioner never advised the respondent of this switch. Furthermore, this auto dealer with an allegedly "impeccable record" billed the respondent at the

price customarily charged for the genuine Rolls Royce part. For its proof of these facts at trial, respondent relied entirely on the admissions of an employee of the petitioner—its parts manager. The car dealer offered not one shred of evidence in an attempt to rebut these facts, did not even cross examine the parts manager who supplied this testimony and made no argument to this issue in summation. The trial court instructed the jury on this issue of fraud by requiring that respondent prove its allegations by proof which was "clear, precise and indubitable." As noted, the jury responded with a verdict finding petitioner guilty of civil fraud. Therefore, regardless of the outcome of this appeal, petitioner's "impeccable record", such as it may have been, is already seriously tarnished and impugned because of the petitioner's slight-of-the-hand dealings in the respects here outlined.

D.

The case law petitioner references is inapposite. In each instance cited, the higher standard of proof (i.e., greater than a preponderance) was applied because of the extreme circumstances of the type of case under consideration. In *Woodby v. Immigration and Naturalization Service*, 385 U. S. 276, 277, 87 S. Ct. 483, 484 (1976), the question presented concerned the burden of proof the Government must sustain in deportation proceedings. In describing those circumstances, the Court wrote at page 285:

> The Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have

> spoken of the solidarity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years. * * * *Rowoldt v. Perfetto,* 355 U. S. 115, 120, 78 S. Ct. 180, 183.

In *Addington v. Texas,* 99 S. Ct. 1804, 1806 (1979) the question presented regarded the standard of proof which is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under a state law to commit an individual to a mental hospital involuntarily and for an indefinite period of time. In *Collins Securities Corporation v. S. E. C.,* 562 F. 3d 820 (C. A. D. C. 1977) the question presented was whether the Securities and Exchange Commission erred in using the preponderance of the evidence standard of proof under the facts and circumstances of the case before it. In holding that the application of the preponderance standard was error the Court noted the reasons for its position being:

> Because of the type proof involved in an alleged fraud type case and of extremely serious consequences to the petitioners of the sanctions imposed by the SEC in this case . . . Id. at 821

With respect to the extremely serious consequences to the petitioner spoken of by the Court, the SEC had ordered:

(1) That the broker-dealer and investment adviser registration of CSC be revoked;

(2) That CSC be expelled from membership in the National Association of Securities Dealers, Inc.;

(3) That petitioner Collins be barred from association with any broker or dealer, provided that after two years, he may apply to the Commission

> to become so associated in a position which is not directly or indirectly connected with the making of markets in securities. Id. at 821

The court characterized the Commissions' actions as "punitive" *vis a vis* the broker and described them as ". . . drastic sanctions which in effect amount to a deprivation of livelihood for the sanctioned parties." Id. at 824, 823.

Deportation, indefinite, involuntary incarceration in a mental institution and direct immediate deprivation of one's livelihood along with revocation of professional licenses are considerably more grave than petitioner's plight. To be sure, to be identified as an auto dealer who alters mileage on used vehicles might damage the used car portion of one's automobile business. However, such would not entirely deprive him of his home, his freedom or his licenses and ability to continue to conduct his business.

This Court has seen fit to require the Government to supply proof of a level greater than a preponderance in deportation cases. *Woodby, supra.* Such seems appropriate in those circumstances. Likewise, the Court found constitutional grounds for requiring a standard of proof of a level greater than a preponderance in cases where involuntary and indefinite incarceration of the mentally ill is sought. *Addington, supra.* Such too seems to be appropriate in those circumstances. Undoubtedly, there may be other circumstances when the outcome of litigation presents comparably drastic and complete deprivations which thereby compel this Court to step into an area to make a broad prescription requiring that the complainant satisfy a higher level of proof than a preponderance. However, the case at bar and particularly the actions of this petitioner do not appear to justify such a step by this Court.

II.

Neither the Trial Court Nor the Court of Appeals Acted Contrary to Pennsylvania Law in Awarding Punitive Damages of $50,000 When Viewed in Light of All the Circumstances of the Case.

The following excerpt from the post trial Memorandum and Order filed by the trial court on April 5, 1979 well explains the appropriateness of the punitive damages award and its adherence to Pennsylvania law.

> One of the defendant's objections to the verdict is meritorious. The jury returned a verdict of $125,000 for punitive damages for gross negligence, despite having awarded but $5,200 in actual damages for negligence. The Court charged the jury that an award of punitive damages must be reasonably related to any actual damages awarded. (n. T. 4-225). *Hughes v. Babcock*, 349 Pa. 475 (1944).
>
> The Court has found no Pennsylvania case which has approved punitive damages in an amount approaching twenty-five times the actual damages sustained. Admittedly, a multiplier is not the best indicator of the propriety of the verdict, notwithstanding some early cases that implied that it is. Cf. *Thompson v. Swank*, 317 Pa. 158 (1934). Each case involves unique facts, and ideally, "the jury fixes the amount of such damages (which are in no sense compensatory but purely penal in nature) without yardstick, subject only to reduction by the court if deemed excessive under the circumstances of the particular case." *International Electronics Co. v. N. S. T. Metal Products Co., Inc.*, 370 Pa. 213, 225 (1952). Nevertheless, as a matter of law, the punitive damages awarded here were excessive and not "reasonably related" to the actual damages.

This Court adopts the aproach to this issue set forth in Judge Fullam's learned opinion in *Thomas v. E. J. Korvette, Inc.*, 329 F. Supp. 1163 (E. D. Pa. 1971), *rev'd on other grounds*, 476 F. 2d 471 (1973):

> "[I]t is my view that the concept of reasonable relationship between a punitive award should vary, depending upon (a) the egregiousness of the defendant's wrongful conduct and (b) the relative generosity of the compensatory award." 329 F. Supp. at 1170.

In this case the plaintiff's evidence, if believed, established a wreckless, life-threatening indifference on the part of the defendant to the safety of Mr. Dervaes and his passengers. The jury could properly have found that the conduct was egregious.

In *Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (E. D. Pa. 1977), aff'd, Nos. 77-1411 and 77-1412 (3d Cir., March 9, 1979), Judge Becker approved an award of $60,590.96 in punitive damages above an award of $10,000 in actual damages. There, the defendant's staff doctor made statements to the press to the effect that the plaintiff had a fatal disease which, in fact, he did not have. Judge Becker found that "the size of the award permissibly reflects a concern that the kind of conduct found to have taken place requires a punishment which will chill the recurrence of similar conduct." 431 F. Supp. at 271.

The conduct detailed in Chuy, supra., was egregious, but not life-threatening. The conduct in this case justifies an award proportionately larger than the amount approved there (although the absence of actual personal injury to Mr. Dervaes holds down the figure somewhat). The Court finds that, on an award of compensatory damages of $5200 for

negligence (which the Court believes to have been approximately accurate), the jury might properly have awarded "reasonably related" punitive damages in the sum of $50,000.

Obviously, the standard for determining what punitive damages are "excessive" is no more precise than the standard for determining what punitive damages are proper in the first place. However, the "reasonably related" limitation is a legal constraint that cannot be ignored. The jury's verdict was properly in accord with all of the factors that must be considered in awarding punitive damages, except that the award was not reasonably related to the actual damages.

The Court heard the same evidence of the defendant's misconduct that the jury heard. The most likely explanation for the discrepancy between the Court's conclusion and the jury's is that *the Court considers itself constrained by the "reasonably related" standard*—it does not appear, realistically, that the jury accorded that standard much, if any, consideration.

The amount of punitive damages that the Court considers appropriate is, so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law. *Considering the egregiousness of the defendant's conduct and the deterrent purposes of punitive damages, an award of punitive damages in the amount of $50,000 is reasonably related to the actual damages.* However, $50,000 is the maximum amount that a reasonable juror could have found to have been reasonably related to the actual damages found in this case.

It is important to point out that the trial court did specifically apply Pennsylvania's proportional rule. In addition, it focused on the "surrounding circumstances" as is mandated by Pennsylvania law as well. (*Hughes v. Babcock, supra.*) The jury returned an award which the trial court felt did not comply with the applicable principles of Pennsylvania law and, therefore, the court reduced the award in accordance with those principles. There can be no vaild argument that the trial court and in turn, the court of appeals failed to take cognizance of state law. Petitioner merely disputes the numbers arrived at by the court and the judgmental factors involved in lowering the award. Such does not appear to be an appropriate subject for review under *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

CONCLUSION.

For the reasons set forth above, a writ of certiorari should not issue to review the judgment and opinion of the court of appeals in the instant case.

Respectfully submitted,

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APPENDIX

MEMORANDUM AND ORDER
(APRIL 4, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. R. D. CORPORATION

v.

KEENAN MOTORS, INC.

CIVIL ACTION
No. 77-4143

NEWCOMER, *J.* April 4, 1979.

The defendant has moved for judgment notwithstanding the verdict, or in the alternative for a new trial. Most of the defendant's arguments do not require discussion, and the defendant's motion will be denied, but the Court finds that it will be required to amend the judgment in certain respects.

The defendant first argues that the verdict on the odometer count of the complaint must be overturned. The Court may not have come to the same conclusion that the jury did on the issue, but reasonable minds could certainly differ as to whether the plaintiff had proved its

case. Abundant evidence supports the jury's verdict. Judgment n. o. v. is therefore not warranted.

The Court charged the proper standard of proof on the odometer count. "Fraud" was not in issue; "intent to defraud" was. The defendant did not point to any case which has applied a higher than normal standard of proof in an action under 15 U. S. C. § 1989, and the Court cannot infer that Congress intended that a higher burden of proof should be placed on such actions. In the absence of any contrary authority, the Court must apply the usual civil standard of proof, i.e. proof by a preponderance of the evidence.

The defendant argues that the Court should have granted a mistrial when the plaintiff's counsel mentioned the amount sought in the *ad damnum* clause of the complaint. The Court carefully and repeatedly instructed the jury to disregard the remark and the Court is confident that the jury was able to do so. Refusal to declare a mistrial was not error. *Garrettt v. Faust,* 183 F. 2d 625 (3d Cir. 1950); *Bowers v. Pennsylvania R. R. Co.,* 281 F. 2d 953 (3d Cir. 1960); 58 Am Jur. 2nd, *New Trial,* § 56, n. 12.

The defendant argues that the jury should have been charged in accordance with Restatement of Torts, Section 909, as to the facts that must be found before an employer may be held liable for punitive damages for the acts of its employees.

The defendant is incorrect in its reading of the law. A corporation may be held liable for punitive damages for the act of its servant acting within the scope of his authority. *Chuy v. The Philadelphia Eagles Football Club.* Nos. 77-1411 and 77-1412 (3d Cir., March 9, 1979) (Slip Opin. at 20); *Skeels v. Universal CIT Credit Corp.,* 335 F. 2d 846 (3d Cir. 1964). All the acts proved in this case were clearly within the scope of such authority.

In any event, the Court's refusal to charge on the point was not objected to with sufficient specificity for the Court to be properly apprised of the claimed error. Rule 51, F. R. Civ. P.

One of the defendant's objection to the verdict is meritorious. The jury returned a verdict of $125,000 for punitive damages for gross negligence, despite having awarded but $5,200 in actual damages for negligence. The Court charged the jury that an award of punitive damages must be reasonably related to any actual damages awarded (n. T. 4-225). *Hughes v. Babcock*, 349 Pa. 475 (1944).

The Court has found no Pennsylvania case which has approved punitive damages in an amount approaching twenty-five times the actual damages sustained. Admittedly, a multiplier is not the best indicator of the propriety of the verdict, notwithstanding some early cases that implied that it is. Cf. *Thompson v. Swank*, 317 Pa. 158 (1934). Each case involves unique facts, and ideally, "the jury fixes the amount of such damages (which are in no sense compensatory but purely penal in nature) without yardstick, subject only to reduction by the court if deemed excessive under the circumstances of the particular case." *International Electronics Co. v. N. S. T. Metal Products Co., Inc.*, 370 Pa. 213, 225 (1952). Nevertheless, as a matter of law, the punitive damages awarded here were excessive and not "reasonably related" to the actual damages.

This Court adopts the approach to this issue set forth in Judge Fullam's learned opinion in *Thomas v. E. J. Korvette, Inc.*, 329 F. Supp. 1163 (E. D. Pa. 1971), *rev'd on other grounds*, 476 F. 2d 471 (1973):

> "[I]t is my view that the concept of reasonable relationship between a punitive award should vary,

depending upon (a) the egregiousness of the defendant's wrongful conduct and (b) the relative generosity of the compensatory award." 329 F. Supp. at 1170.

In this case the plaintiff's evidence, if believed, established a wreckless, life-threatening indifference on the part of the defendant to the safety of Mr. Dervaes and his passengers. The jury could properly have found that the conduct was egregious.

In *Chuy v. Philadelphia Eagles Football Club,* 431 F. Supp. 254 (E. D. Pa. 1977), aff'd, Nos. 77-1411 and 77-1412 (3d Cir., March 9, 1979), Judge Becker approved an award of $60,590.96 in punitive damages above an award of $10,000 in actual damages. There, the defendant's staff doctor made statements to the press to the effect that the plaintiff had a fatal disease which, in fact, he did not have. Judge Becker found that "the size of the award permissibly reflects a concern that the kind of conduct found to have taken place requires a punishment which will chill the recurrence of similar conduct." 431 F. Supp. at 271.

The conduct detailed in *Chuy, supra,* was egregious, but not life-threatening. The conduct in this case justifies an award proportionately larger than the amount approved there (although the absence of actual personal injury to Mr. Dervaes holds down the figure somewhat). The Court finds that, on an award of compensatory damages of $5200 for negligence (which the Court believes to have been approximately accurate), the jury might properly have awarded "reasonably related" punitive damages in the sum of $50,000.

Obviously, the standard for determining what punitive damages are "excessive" is no more precise than the

standard for determining what punitive damages are proper in the first place. However, the "reasonably related" limitation is a legal constraint that cannot be ignored. The jury's verdict was properly in accord with all of the factors that must be considered in awarding punitive damages, except that the award was not reasonably related to the actual damages.

The Court heard the same evidence of the defendant's misconduct that the jury heard. The most likely explanation for the discrepancy between the Court's conclusion and the jury's is that the Court considers itself constrained by the "reasonably related" standard—it does not appear, realistically, that the jury accorded that standard much, if any, consideration.

The amount of punitive damages that the Court considers appropriate is, so far as the Court has been able to determine, proportionately larger, in relation to the actual damages, than any award that has been approved in any reported decision construing Pennsylvania law. Considering the egregiousness of the defendant's conduct and the deterrent purposes of punitive damages, an award of punitive damages in the amount of $50,000 is reasonably related to the actual damages. However, $50,000 is the maximum amount that a reasonable juror could have found to have been reasonably related to the actual damages found in this case.

The Court will not order a remittitur of the excess damages with a new trial as an alternative. A remittitur is proper only where the jury's award is directly and seriously contrary to the facts. The Court finds that the compensatory award was reasonable; only the punitive award was excessive. In the Court's opinion, a second jury, on these facts, could return a maximum amount, as a matter of law, of $50,000 in punitive damages for gross negligence. Where only the question of "reasonable rela-

tionship" between the two awards is at issue, a court may reduce the punitive award without ordering a new trial as an alternative. *Hughes v. Babcock, supra,* 349 Pa. at 481.

The plaintiff is entitled to costs and attorney's fees for the prosecution of this action. 15 U. S. C. § 1989(a)(2). By separate Order the Court will schedule a hearing on the question of the proper amount of attorney's fees to be awarded in this case, and the judgment will be amended thereafter accordingly. See, generally, *Lindy Brothers, Inc. v. American Radiator and Standard Sanitary Corp.,* 487 F. 2d 161 (3d Cir. 1973), *following* remand, 540 F. 2d 102 (3d Cir. 1976).

Costs will be taxed against the defendant by the Clerk of Court. The plaintiff shall file a bill of costs which the Clerk will first consider and then allow in whole or in part. Rule 38, Local Rules of Civil Procedure. After the conclusion of the hearing on attorney's fees the judgment will be formally amended to reflect the reduction in the award of punitive damages, and the addition of attorney's fees and costs.

s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. R. D. CORPORATION

v.

KEENAN MOTORS, INC.

CIVIL ACTION NO. 77-4143

ORDER

AND NOW, to wit, this 4th day of April, 1979, upon consideration of the defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, it is hereby Ordered that the motion is DENIED.

The judgment will be amended at a later time to reflect an award of attorney's fees and costs, and, in accordance with the accompanying Memorandum, a reduction in the award of punitive damages to the amount of fifty thousand dollars ($50,000).

AND IT IS SO ORDERED.

s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

MEMORANDUM AND ORDER (JULY 2, 1979)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. R. D. CORPORATION

v.

KEENAN MOTORS, INC.

CIVIL ACTION NO. 77-4143

NEWCOMER, *J.* July 2, 1979

Upon consideration of the plaintiff's motion for attorneys' fees, the Court makes the following findings:

1. The plaintiff was the prevailing party in an action brought under 15 U. S. C. § 1981, *et seq.*, which prohibits sale of a motor vehicle with an odometer known to be incorrect, unless that fact is revealed to the buyer. 15 U. S. C. § 1989(a)(2) provides for the award of reasonable attorneys' fees to a plaintiff who establishes the defendant's liability under the statute. In this case a jury awarded the plaintiff a verdict of $4,500 which was trebled by the Court pursuant to 15 U. S. C. § 1989(a)(1).

2. To arrive at the reasonable fee award for the services of the plaintiff's attorney in prosecuting its odometer claim, the Court must find the reasonable hourly rate for the attorney's services and multiply it by the number of

compensable hours expended by the attorney. After this "lodestar" amount is found, the Court can increase or decrease it to reflect the contingent nature of success and the quality of the attorney's work in the case. *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 487 F. 2d 161 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 540 F. 2d 102 (3d Cir. 1976) (*Lindy II*).

3. This case is complicated somewhat by the presence of additional claims (i.e. Fraud and Negligence), upon which the plaintiff also prevailed at trial. Plaintiff's counsel's records of time worked understandably do not distinguish between time spent on the odometer claims and time spent on the plaintiff's other claims. The Court held a hearing to determine what amount of time was actually spent on the odometer portion of the case, which was compensable under 15 U. S. C. § 1989.

4. The Court finds that plaintiff's counsel spent approximately 50% of his total billable time on the odometer portion of the case. The odometer issues were easily the most complex issues of the case, both legally and factually. The Court believes that more than half of the evidence adduced at trial related to the odometer claim, and it is apparent from counsel's affidavit in support of the motion for attorneys' fees that approximately half of his preparation time was spent on odometer-related issues. The defendant was unable to rebut that showing at hearing, and the Court finds plaintiff's counsel's affidavit to be entirely credible.

5. Plaintiff's counsel's affidavit is also entirely credible and unrebutted as to the total amount of time spent on the case. Counsel maintained a careful, professional log of his activities during the case. A review of the affidavit

shows nothing out of the ordinary or excessive. The log shows that plaintiff's counsel spent 369½ hours in out-of-court time, and 21 hours of in-court time. Counsel's billing rates are $70 per hour for out-of-court work, and $100 per hour for in-court work.

6. Plaintiff's counsel, Mr. Owens, has been practicing law for 8 years, approximately 4 of which have been spent as a litigation specialist. The Court believes that counsel's billing rate is commensurate with the normal billing rate for attorneys of his experience and ability in the area, and finds those rates to be reasonable. Hence, the "lodestar" can be calculated by multiplying out-of-court billing rate and multiplying again by .5 (reflecting the amount of time spent on odometer issues). Similarly, the in-court-time must be multiplied by the in-court billing rate, and again by 50%, which is approximately the amount of in-court time devoted to odometer issues, when opening and closing statements, all arguments of counsel, and presentation of evidence is considered together. The Court calculates the "lodestar" amount as $13,982.50.

7. Before finally determining the actual fee to be awarded, two other factors must be considered: the quality of the attorney's work and the contingent nature of success. *Lindy I, supra.* In this case, the quality of counsel's work was excellent, and the obstacles against his establishing the odometer claim were formidable. Considering the testimony of the prior owners of the car presented by the defendant, the Court frankly might not have arrived at the same conclusion that the jury did, i.e. that the car had travelled more miles than were reflected on its odometer at the time it was sold to the plaintiff. Plaintiff's counsel did a good job of marshalling his proof and carrying his burden of persuasion, and his use of witnessses who were experts on the subject of automobile

wear patterns obviously required a significant investment of counsel's time. Nevertheless, the Court will not therefore increase the "lodestar" amount, for two reasons. First, it is not at all clear whether the contingent nature of success should be given extensive consideration where the statute contemplates awarding attorneys' fees only where the plaintiff has already prevailed, eliminating any contingency. Secondly, the Court must admit (as does plaintiff's counsel) that its conclusion that counsel spent 50% of his time on odometer issues is at best an approximation.

8. Although the Court believes that plaintiff's counsel rendered highly professional service, the "lodestar" amount must be reduced somewhat on another basis. *Lindy I* "permits the court . . . to reduce the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended." *Merola v. Atlantic Richfield Co.*, 515 F. 2d 165, 168-9 (3d Cir. 1975). Here, the plaintiff gained a verdict of $4,500 on his odometer count which was trebled, pursuant to statute, to $13,500. To award attorney's fees in an amount exceeding actual damages, trebled, would be to penalize the defendant to an extent not contemplated by Congress. On the other hand, it would be a rare case in which the actual amount of loss attributable to odometer fraud exceeded the cost of pursuing the claim through trial, a fact of which Congress must have been aware. The Court must strike a balance which avoids unduly punishing the defendant, while avoiding penalizing plaintiff's counsel for the careful and thorough manner in which he prepared his case. The Court believes that a fee award of $9500 (slightly more than two-thirds of the "lodestar") is high enough to encourage the bringing of similar claims, yet low enough to avoid unnecessarily penalizing the de-

fendant. The sum of $9500 amounts to "reasonable attorney fees" (15 U. S. C. § 1989(a)(2)) under all the circumstances of the case.

9. Plaintiff is also entitled to an award compensating it for the attorneys' fee of local counsel, Astor and Weiss. See Local Rule of Civil Procedure 10. Astor and Weiss billed the plaintiff for $840.00 for services rendered. That amount must be adjusted by the 50% figure discussed above, to the amount of $420.00. The Court finds that $420.00 is a reasonable amount for services rendered by local counsel with respect to the odometer issues.

10. The plaintiff shall be awarded attorneys' fees in the amount of $9,920.00.

s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

A. R. D. CORPORATION

v.

KEENAN MOTORS, INC.

CIVIL ACTION NO. 77-4143

ORDER

AND NOW, to wit, this 2nd day of July, 1979, upon consideration of the plaintiff's Motion for the Award of Attorneys' Fees, and in accordance with the accompanying memorandum, it is hereby Ordered that the plaintiff is entitled to attorneys' fees in the amount of $9,920.00.

It is further Ordered that the plaintiff's various post-trial motions relating to discovery with respect to execution of judgment are DENIED; and the Court's Order staying the transfer of the record on appeal is hereby dissolved.

An amended final judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $79,626.00, plus costs as determined by the Clerk of Court.

AND IT IS SO ORDERED.

s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*